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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|---------------------|------------------|
| 10/507,143 | 09/09/2004 | Harald Breivik | 01702.403100. | 9090 |
| 5514 7590 02/04/2009 FITZPATRICK CELLA HARPER & SCINTO 30 ROCKEFELLER PLAZA NEW YORK, NY 10112 | | | | |
| EXAMINER | | | | |
| DEES, NIKKI H | | | | |
| ART UNIT | | PAPER NUMBER | | |
| 1794 | | | | |
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action
Before the Filing of an Appeal Brief

Application No.

10/507,143

Applicant(s)

BREIVIK ET AL.

Examiner

Nikki H. Dees

Art Unit

1794

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 23 January 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 7-17 and 21-26.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Lien Tran/
Primary Examiner
Art Unit 1794

/Nikki H. Dees/
Examiner, Art Unit 1794

Continuation of 11, does NOT place the application in condition for allowance because: Regarding the 102 rejection of claims 7-12 and 14, Applicant argues that as the invention of Breivik et al. (WO 00/01249) pertains to salmonids, while the instant invention pertains to marine species, the claimed method is not anticipated by the prior art (Remarks, p. 5). As detailed in paragraphs 4 and 5 of the Office Action mailed on Sept. 30, 2008, the method of Breivik et al. allows for a food with the same formulation as claimed by the instant claims to be fed to fish. Applicant's claim to a "marine species" occurs in the preamble of the claim. As the claim body details a structurally complete invention and the preamble is used only to state an intended use for the invention, the preamble is not considered to be a claim limitation. The teachings of Breivik et al. are therefore considered to anticipate Applicant's claims 7-12 and 14.

Regarding the 103 rejection of claims 13, 15-17 and 21-26, Applicant argues that the oxidation process targeted by Breivik is different than the oxidation product targeted by the claimed invention as Breivik pertains to stabilization during production of the food, while the instant invention pertains to ongoing stabilization, including after the food is produced (Remarks, pp. 7-8). In response, it is noted that the oxidation process to which Applicant refers is not present in any of the rejected claims. Claims 13, 15-17, and 21-26 pertain to the age and type of fish being fed in the method, the presence of antioxidants in the foodstuffs, and the presence of carotenoids in the foodstuffs. As detailed in the Office Action mailed Sept. 30, 2008, the method of Breivik et al. is considered to anticipate claims 7-12 and 14. As the method of Breivik is directed to the feeding of salmonids, carotenoids are added to the composition to provide the salmon flesh with its distinctive coloration. With the 103 rejection of claims 13, 15-17 and 21-26, one of ordinary skill would have recognized that if it were desired to feed the foodstuff of Breivik to white-fleshed fish, such as cod or halibut, it would not be desirable to provide a feed containing carotenoids as the fish are not known to have a colored flesh as is present in salmon.

The rejections previously presented are maintained.